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No. 01-29

IN THE
Supreme Court of the United States

AMWAY CORPORATION, RANDY HAUGEN, DEXTER YAGER, SR., RANDY WALKER, AND DONALD R. WILSON,

Petitioners,

v.

THE PROCTER & GAMBLE COMPANY AND THE PROCTER & GAMBLE DISTRIBUTING COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

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16 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. THE DEFINITION OF "COMMERCIAL SPEECH" WARRANTS CERTIORARI 1

II. THE APPLICABILITY OF "ACTUAL MALICE" PROTECTIONS TO COMMERCIAL SPEECH WARRANTS CERTIORARI 5

III. THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR RESOLVING THESE IMPORTANT QUESTIONS 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases:

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 1, 6

Board of Trustees v. Fox,
492 U.S. 469 (1989) 9

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983) 1, 3, 7

Buckley v. Valeo,
424 U.S. 1 (1976) 10

Cardtoons, L.C. v.
Major League Baseball Players Ass'n,
95 F.3d 959 (10th Cir. 1996) 4

Central Hudson Gas & Elec. Corp. v.
Public Serv. Comm'n,
447 U.S. 557 (1980) 1, 6

City of Cincinnati v. Discovery Network,
507 U.S. 410 (1993) 2

Commodity Trend Service, Inc. v.
Commodity Futures Trading Comm'n,
149 F.3d 679 (7th Cir. 1998) 2

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985) 1, 6, 7

Duncan v. Walker,
531 U.S. 991 (2001) 8

Fleming v. Kane County,
636 F. Supp. 742 (N.D. Ill. 1986) 3

Garcia v. Board of Education,
777 F.2d 1403 (10th Cir. 1985) 7

Hoffman v. Capital Cities/ABC Inc.,
255 F.3d 1180 (9th Cir. 2001) 2, 3

Hustler Magazine, Inc. v. Falwell,
485 U.S. 46 (1988) 6

Lorillard Tobacco Co. v. Reilly,
121 S. Ct. 2404 (2001) 6

New York Times v. Sullivan,
376 U.S. 254 (1964) 6

Norfolk Shipbuilding & Drydock Corp. v. Garris,
121 S. Ct. 1927 (2001) 9

Philadelphia Newspapers, Inc. v. Hepps,
475 U.S. 767 (1986) 9

Seling v. Young,
531 U.S. 250 (2001) 8

TrafFix Devices, Inc. v. Marketing Displays, Inc.,
121 S. Ct. 1255 (2001) 8,9

Whetsel v. Network Prop. Servs., LLC,
246 F.3d 897 (7th Cir. 2001) 3

Woods v. Evansville Press Co.,
791 F.2d 480 (7th Cir. 1986) 2, 7

Woods v. Interstate Realty Co.,
337 U.S. 535 (1949) 3

World Wrestling Fed'n Enter., Inc. v. Bozell,
142 F. Supp. 2d 514 (S.D.N.Y. 2001) 5

Zauderer v.
Office of Disciplinary Counsel of Supreme Court,
471 U.S. 626 (1985) 7

Constitutions and Rules:

U.S. Const. art. I ..... *passim*

S. Ct. R. 12.6 10

Other Authorities:

Laurence H. Tribe,
American Constitutional Law (2d ed. 1988) 2

INTRODUCTION

P&G asserts that *certiorari* is unwarranted because the Fifth Circuit simply applied settled law to the facts of this case. That assertion is incorrect for the simple reason that there *is* no settled law in the area of commercial speech. As noted in the petition, this Court itself (not to mention individual Justices, the lower courts, and commentators) has acknowledged the inconsistency of the precedents in this area. Pet. 7-8, 22-23. In particular, this Court has suggested both that "commercial speech" means only advertising, *see, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (plurality opinion), and that it does not, *see, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). And this Court has held that the "actual malice" standard applies to commercial speech, *see, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), but has also suggested that it does not, *see, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). It is hardly surprising, therefore, that the lower courts are in disarray. This Court's authoritative guidance is badly needed, and this case provides a highly appropriate vehicle for resolving these recurring questions of great significance to our system of free expression.

I. THE DEFINITION OF "COMMERCIAL SPEECH" WARRANTS CERTIORARI.

The Fifth Circuit held that speech "at the heart of First Amendment protections" can be deemed commercial if the speaker's "motivation" is economic. App. 21a-22a, 24a-26a. As noted in the petition, that holding (i) reflects the confusion caused by this Court's jurisprudence on the definition of "commercial speech," (ii) conflicts with decisions of other courts of appeals, and (iii) undermines core First Amendment values. *See* Pet. 6-17.

In response, P&G argues that "there is no doctrinal confusion" on the definition of commercial speech, Opp. 16, and that it is "wholly fictitious" to suggest otherwise, *id.* at 1.

But P&G simply ignores the authorities Amway cited for that proposition. *See* Pet. 7-8 (citing, *e.g.*, *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993); Laurence H. Tribe, *American Constitutional Law* 896 (2d ed. 1988)). Indeed, P&G itself relies on a case that *agrees* that "the boundary between commercial and noncommercial speech has yet to be clearly delineated." *Hoffman v. Capital Cities/ABC Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) (cited in Opp. 22).

In addition to ignoring these authorities, P&G asserts that "[t]here are no genuine disagreements of significance among the courts of appeals" on the definition of commercial speech. Opp. 1, 14-16. Whatever P&G might mean by "genuine disagreements of significance," there is no question that there is a circuit split on this important question. Thus, P&G conveniently ignores the first case Amway cited on this point – *Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679 (7th Cir. 1998). As explained in the petition, and unrebutted in the opposition brief, *Commodity Trend Service* is in conflict with the Fifth Circuit's decision because it limits "commercial speech" to the "traditional definition" set forth in several of this Court's precedents, while the Fifth Circuit adopted a broader definition based on *Bolger*. *See* Pet. 9.

P&G at least addresses the other Seventh Circuit case cited in the petition, *Woods v. Evansville Press Co.*, 791 F.2d 480 (7th Cir. 1986). *Woods* is directly on point. There (as here) a competitor of the plaintiff was alleged to have defamed him, "solely for profit," by misrepresenting his religious beliefs. *Id.* at 483-84. There (as here) the plaintiff argued that "actual malice" protections did not apply because the speech was commercial. *Id.* But there (*unlike* here) the court held that the speech was *not* commercial. *Id.* at 484.

P&G attempts to evade this square conflict by claiming that *Woods* arose under state law and the Seventh Circuit's discussion of federal law was therefore "*dictum*." Opp. 15. Actually, the Seventh Circuit addressed the First Amendment

issue under *both* federal *and* state law, relying on no fewer than seven precedents of this Court in doing so. *See* 791 F.2d at 483-84. Thus, the federal and state law discussions are alternative holdings equally entitled to "precedential weight;" there is no basis for deeming one controlling and the other *dictum*. *Whetsel v. Network Prop. Servs., LLC*, 246 F.3d 897, 903 (7th Cir. 2001); *see also Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum."). As a result, the courts in the Seventh Circuit have followed *Woods* as a matter of federal law. *See Fleming v. Kane County*, 636 F. Supp. 742, 748 (N.D. Ill. 1986).

P&G also claims that the petition is "less than candid" in describing *Thomas v. Anchorage Equal Rights Comm'n* because that case "articulated the *Bolger* test clearly and applied it easily." Opp. 16. It is not Amway that has candor issues. In *Thomas*, the Ninth Circuit *declined* to follow *Bolger* because this Court had "cast serious doubt upon *Bolger*." 165 F.3d 692, 710 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (2000) (*en banc*). The Ninth Circuit then relied on other decisions of this Court for the proposition that commercial speech is limited to "a case of 'I will sell you X at the Y price.'" *Id.*

Indeed, after Amway filed its petition, the Ninth Circuit held once again – in a case relied on by P&G – that speech is commercial only if it is "a simple advertisement." *Hoffman*, 255 F.3d at 1185-86. The court recognized that the speech at issue in that case could "help to sell" the defendant's products. *Id.* at 1186. Nonetheless, the Ninth Circuit held that it was not "commercial speech" because it did not "simply advance a commercial message." *Id.* at 1185. Instead, "[a]ny commercial aspects are inextricably entwined with expressive elements, . . . so they cannot be separated out from the fully protected whole." *Id.* (internal quotations omitted). So too here, the speech was "not a simple advertisement," *id.* at 1186, but instead (in the words of the Fifth Circuit) addressed "issues that are at the

heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." App. 21a-22a.

For the same reason, the Fifth Circuit's decision is also in conflict with the Tenth Circuit's holding that "commercial speech is best understood as speech that *merely advertises* a product or service for business purposes." *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) (emphasis added); Pet. 11 n.2. As with *Commodity Trend Service*, P&G does not even acknowledge *Cardtoons*, much less attempt to distinguish it.

Even if there were not a circuit split, and even if this Court's precedents did not require clarification, *certiorari* would still be warranted because of the importance of this issue. P&G does not dispute that this Court has granted *certiorari* in any number of First Amendment cases absent a circuit split. *See* Pet. 13, 25. Nor does P&G deny that the nationwide nature of corporations' speech makes it all the more important to grant *certiorari* now, since corporate speakers are effectively bound by the law of the least-protective circuit. *See id.* at 13.

Instead, P&G claims that the petition "distort[s] the Fifth Circuit's opinion" because that court "did not treat any single factor as determinative," but instead engaged in a "unique and fact-dependent" analysis. Opp. 12, 13, 18. As explained in the petition, the Fifth Circuit held that speech is commercial if it (i) references a product or service, and (ii) has a substantial economic motivation. *See* Pet. 10. The court explained that under this holding, it matters not whether the speech is "an advertisement in the classic sense." App. 25a. This decision not only conflicts with the decisions discussed above, it also undercuts core First Amendment values by focusing on the speaker's motivation. *See* Pet. 13-17. The petition illustrates the importance of this point by reference to several common scenarios, including speech by the media and consumer boycotters. *See id.* at 14, 16-17. P&G makes *no* attempt to distinguish *any* of these situations.

Nor are these concerns academic. A district court recently relied on the Fifth Circuit's decision to deprive public-interest groups of First Amendment protection. *See World Wrestling Fed'n Enter., Inc. v. Bozell*, 142 F. Supp. 2d 514 (S.D.N.Y. 2001). In that case, the World Wrestling Federation ("WWF") sued parents of children who had been killed by other children imitating professional wrestlers. *See id.* at 519. The parents had organized public-interest groups to disseminate information about their belief that the WWF was responsible for their children's deaths. *See id.* at 521. The WWF sued for defamation, claiming that the parents had made incorrect and defamatory statements. *See id.* at 519-20. Relying on the Fifth Circuit's decision below, the district court held that the parents' speech was "commercial" because (i) the speech referenced products of the WWF, and (ii) the speech was included in letters that sought to raise funds for the public-interest group, and thus had an economic motive. *See id.* at 525-26. Like the Fifth Circuit, the *WWF* court thereby deprived core protected speech of First Amendment protection.

The *WWF* decision shows both the extent to which the "commercial speech" doctrine is straying from its advertising moorings and the danger posed by the Fifth Circuit's decision to First Amendment freedoms. It also refutes P&G's contention that this case presents an "extraordinarily unusual factual setting" that is unlikely to recur. Opp. 26. The facts will change from case to case, but the legal principle is an important and recurring one.

II. THE APPLICABILITY OF "ACTUAL MALICE" PROTECTIONS TO COMMERCIAL SPEECH WARRANTS CERTIORARI.

Even if the speech at issue were "commercial," the Fifth Circuit still erred by holding that the "commercial speech" label alone dictates the applicable level of constitutional protection. Amway's petition explains that this holding (i) conflicts with this Court's defamation precedents, (ii) reflects the uncertainty created by this Court's "commercial speech" jurisprudence,

(iii) conflicts with decisions of other courts, and (iv) undermines core First Amendment values. *See* Pet. 18-28.

Public figure P&G completely ignores the first two of these points. It makes no attempt to reconcile the Fifth Circuit's decision with *Dun & Bradstreet, Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), or *New York Times v. Sullivan*, 376 U.S. 254 (1964). Nor could it. Those cases hold that the applicability of "actual malice" protections turns on whether the plaintiff is a public figure or public official and whether the speech addresses matters of public importance – *not* whether the speech could also be deemed "commercial." *See* Pet. 18-20.

Nor does P&G deny that the Fifth Circuit's decision reflects the confusion caused by the "uncertain course" of this Court's commercial speech jurisprudence. *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2432 (2001) (Thomas, J., concurring in part and in judgment); *see also* Pet. 22-24. In some cases, this Court has held that the "mere fact" that speech is commercial "does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress" it. *44 Liquormart*, 517 U.S. at 501. But in other cases, this Court has relied exclusively on the "commercial speech" label in determining the level of constitutional protection. *See, e.g., Central Hudson*, 447 U.S. at 561-66. Instead of addressing this point, P&G selectively cites cases that support its merits position while ignoring all others. *See* Opp. 23.

With respect to the disagreement among the lower courts, P&G claims that "this controversy proves as illusory as the others" because two other courts of appeals have agreed that "actual malice" protections do not apply to commercial speech. Opp. 22. But the fact that two courts have agreed with the Fifth Circuit does not mean that other courts have not disagreed; it just means that this is a recurring issue that has percolated in the lower courts and is ready for this Court's resolution.

Indeed, P&G concedes that the Fifth Circuit's decision is "contrary" to two other decisions, albeit not federal court of

appeals decisions. Opp. 22 n.13. But P&G ignores (once again) the circuit court decisions Amway cited on this point – *Woods* and *Garcia v. Board of Education*, 777 F.2d 1403, 1410 (10th Cir. 1985). Those cases conflict with the decision below because they hold that "it is *immaterial* to the application of the qualified constitutional privilege [of actual malice] that the defendants may have profited from the publication at issue." *Woods*, 791 F.2d at 484 (emphasis added); *see also Garcia*, 777 F.2d at 1410. Nor does P&G dispute that other circuit courts have assumed that "actual malice" protections apply to commercial speech. *See* Pet. 24, 25.

Finally, P&G does not (and cannot) deny that this is the type of important First Amendment issue on which this Court has granted *certiorari* even absent a circuit split. *See* Pet. 25 (citing *New York Times* and *Hustler*). Instead, P&G misportrays Amway's position and advances a series of *merits* arguments that, while wrong, underscore the importance of the issue.

P&G argues, for example, that "[i]n essence, petitioners are asking this Court to overrule *Central Hudson*, *Bolger*, and *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985), insofar as they held that speech of a commercial nature is not entitled to full constitutional protection . . . ." Opp. 26. P&G likewise asserts that Amway's argument rests on the proposition that the "commercial speech" doctrine applies only to "direct governmental regulation of speech," and not to *any* private lawsuits. Opp. 20. Those are two approaches to resolving the "actual malice" question. But this question can also be decided on the narrower (and commonsense) ground that defamation cases are governed by this Court's defamation precedents, rather than by inapposite cases like *Zauderer*. *See* Pet. 18-24. As noted above, this Court already determined that the constitutional protections accorded to defamation defendants do not turn on whether the speech is "commercial." *Dun & Bradstreet*, 472 U.S. at 762 n.8; Pet. 19-20. P&G does not even acknowledge this point; it

just asserts a contrary position in a conclusory manner. *See* Opp. 23, 26.[1]

III. THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR RESOLVING THESE IMPORTANT QUESTIONS.

This case presents an excellent vehicle for resolving the questions presented because there is no question that P&G is a limited-purpose public figure and the speech involves a matter of public importance. *See* Pet. 18-19; *see also id.* at 4-5. While P&G now attempts to sow confusion on the second of these points, *see* Opp. 26-29, the Fifth Circuit could not have been clearer that the speech addresses "the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." App. 21a-22a. Because the relevant facts were settled below, the questions presented are squarely framed for this Court's resolution.

P&G nonetheless argues that this Court should deny *certiorari* because of the interlocutory posture of this case. *See* Opp. 24-25. The short answer is that this Court routinely grants *certiorari* in such circumstances to settle important legal issues that could resolve the case and provide guidance to other courts. *See, e.g., Seling v. Young*, 531 U.S. 250 (2001); *Duncan v. Walker*, 531 U.S. 991 (2001); *TrafFix Devices, Inc. v.*

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[1] P&G's other merits arguments are especially weak. P&G argues that upholding First Amendment protections would limit plaintiffs' ability to recover under the Lanham Act. *See* Opp. 23. That hardly matters: protecting speakers from punishment is the essence of the First Amendment. P&G also notes that if traditional defamation principles applied, the courts would have to decide whether the plaintiff was a public official or public figure and whether the speech involved a matter of public importance. *See* Opp. 29. Far from a "Pandora's box," as P&G claims, *id.*, these elements have been considered by courts in countless defamation cases over the past decades. Indeed, the district court's holdings that P&G is a public figure and the speech involved a matter of public concern were not even challenged by P&G in the court of appeals. *See* Pet. 18-19.

Marketing Displays, Inc., 121 S. Ct. 1255 (2001); *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 121 S. Ct. 1927 (2001). This is especially true in First Amendment cases, since the constitutional right not to be punished for exercising the right to free speech should be vindicated at the earliest possible moment. Thus, this Court has reviewed a commercial speech decision that remanded for factfinding, *Board of Trustees v. Fox*, 492 U.S. 469 (1989), as well as a defamation decision that remanded for a new trial, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). That is exactly what Amway is asking the Court to do here.[2]

Interlocutory *certiorari* is especially appropriate in this case because a ruling in Amway's favor would be dispositive. While P&G now disputes this point in a footnote, *see* Opp. 24 n.17, it is far too late in the day for P&G to change its tune. In the district court, P&G repeatedly admitted that it could not prove actual malice. *See* R39/2780 ("we never proved that they passed on a statement that they themselves believed to be untrue . . . which as I understand, is where our burden is"); *see also id.* at 2799, 2937. Indeed, after the district court ruled that P&G was required to prove actual malice, P&G told the court that it was no longer "desirous of taking the case to the jury," and "the Court should act accordingly" in disposing of the case. *Id.* at 2838-39. Thus, the Fifth Circuit quite rightly noted that "[t]here is no evidence that Haugen knew the rumor was false when he spread it." App. 7a.

Reversal of the Fifth Circuit's decision would also protect the distributors' freedom of conscience. The Fifth Circuit's

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[2] The constitutional avoidance cases cited by P&G, *see* Opp. 25, are inapposite because the lower courts already – and necessarily – reached the First Amendment issue in this case. Thus, a denial of *certiorari* would not avoid a constitutional issue, but would leave an erroneous constitutional decision in place. To be sure, petitioners might win on remand, but that is true of every interlocutory case in which this Court grants *certiorari*, including those discussed above in the text.

remand would turn the First Amendment on its head by subjecting speakers to an intrusive probing of their beliefs and motivations – an outright violation of their freedom of conscience – as the price for invoking the First Amendment. *See* Pet. 17; *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976).

P&G responds that testifying about one's subjective motives is no different than testifying about whether one knew the speech was false (and thus acted with actual malice). *See* Opp. 19. But it is one thing to testify about which objective facts one did or did not know; it is quite another to be cross-examined on the genuineness of one's convictions and motivations, be they political, religious, or other. P&G also notes that the distributors could choose not to testify about their motives on remand, *see id.*, but that is precisely the point – unless the distributors subjected themselves to a violation of their First Amendment freedom of conscience, they would be hamstrung in their attempt to present a First Amendment defense. Either way, their First Amendment rights would be infringed. Thus, review of these important constitutional issues should occur before, not after, remand.[3]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

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[3] P&G makes two additional assertions that should be set straight. *First*, P&G claims in a footnote that Amway seeks review of only P&G's Lanham Act claim. *See* Opp. 10 n.6. In reality, the petition is quite clear that it seeks review of the federal *and* state claims based on the Satanism rumor. *See* Pet. 2, 5-6, 19. *Second*, P&G claims that the Fifth Circuit reversed the dismissal of its claims against three defendants who have not petitioned for *certiorari*: Ja-Ri Corporation, Amway Distributors Association, and Internet Services Corporation. *See* Opp. (i). P&G is wrong. *See* App. 10a n.6 (Internet Services Corporation), 38a-40a (Ja-Ri Corporation and Amway Distributors Association). Moreover, this point is irrelevant for present purposes because all of the parties to the proceedings below are automatically deemed parties in this Court. *See* S. Ct. R. 12.6; *Director v. Perini N. River Assocs.*, 459 U.S. 297, 303-04 (1983).

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